A **KAMARULZAMAN OMAR & ORS**

**v.**

**YAKUB HUSIN & ORS**

B FEDERAL COURT, PUTRAJAYA
HASHIM YUSOF FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 01-8-2012(B)]
28 OCTOBER 2013

***LAND LAW:*** *Indefeasibility of title and interests - Fraud - Immediate*
D *purchaser and subsequent purchaser - Whether subsequent bona fide purchaser for value without notice of fraud could claim indefeasibility - Whether bona fides of immediate purchaser immaterial if title tainted by any of vitiating elements in s. 340(2) National Land Code - Whether default judgment entered on cause of action for fraud meant fraud had*
E *been proved until judgment set aside*

The appellants' father owned a two-third undivided share in two lots of land ('the lots'). The remaining one-third undivided share in the lots was owned by the appellants' aunt ('the deceased'),
F who died in Indonesia in 1941 without issue. About 43 years later, the first respondent applied for and obtained an order under the Small Estates Distribution Ordinance 1955 to distribute the deceased's undivided share in the lots to the first to the fourth respondents ('the respondents'). Pursuant to the distribution order,
G the respondents were each vested with a 1/12 undivided share in the lots. The respondents subsequently sold and transferred their total one-third undivided share in each lot to the fifth and sixth respondents respectively. The appellants sued the respondents in the High Court to, *inter alia,* cancel the distribution order and set
H aside the registration of the one-third share in the lots in the names of the fifth and sixth respondents. The appellants alleged that the respondents acquired the lots by fraudulently claiming that they were the children or beneficiaries of the deceased when they applied for the order for distribution. The appellants obtained
I judgment in default against the respondents since they had failed to defend the claim. As a result of the default judgment, the trial court ruled that the distribution order was set aside and that fraud had been made out against the respondents without the need for

it to be formally proved. The trial court, however, held that as the fifth and sixth respondents were *bona fide* purchasers for value and were not tainted by the fraud, they acquired indefeasible title and interest to their respective shares under s. 340(3) of the National Land Code ('NLC'). The Court of Appeal concurred with that finding. The appellants, aggrieved by the decision, were granted leave to appeal to the Federal Court.

**Held (allowing appeal; ordering the undivided shares of the fifth and sixth respondents in the lots to be cancelled from the register and be restored to the estate of the deceased)**
**Per Jeffrey Tan FCJ delivering the judgment of the court:**

**(1)** By the fact that the fifth and sixth respondents were *bona fide* purchasers could not give them a shield of indefeasibility. They could only acquire an indefeasible title if they were *bona fide* subsequent purchasers from an immediate purchaser. The first to fourth respondents, from whom the fifth and sixth respondents obtained the title, were not immediate purchasers. They were imposters of those entitled to the estate of the deceased and hence, had no title to pass to the fifth and sixth respondents. Thus, the fifth and sixth respondents were the immediate purchasers and they acquired a title that was not indefeasible and when the fraudulent title of the first to the fourth respondents was set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated. (para 38)

**(2)** Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements set out in s. 340(2) of the NLC acquired a title that is not indefeasible. The *bona fides* of an immediate purchaser is not a shield to defeasibility and his defeasible title is liable to be set aside. His defeasible title only become indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. (para 38)

**(3)** Given that the fraud alleged against the first to fourth respondents was wholly unanswered, the trial court was warranted to hold that with the default judgment, the appellants need not have to prove fraud against the respondents. When judgment was entered against the respondents, all allegations of fraud, which gave rise to the

cause of action, merged in the judgment and until it was set aside, the default judgment was incontestable proof of fraud on the part of the first to the fourth respondents. (para 11)

**(4)** Whenever a registered title or interest is sought to be set aside under s. 340 of the NLC, trial courts should first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If it is the former, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility and his title is liable to be set aside if any of the vitiating elements set out in s. 340(2) of the NLC has been made out. If it is the latter, those vitiating elements would not affect the title or interest, provided the title or interest is acquired by the subsequent purchaser in good faith and for valuable consideration. (para 41)

***Bahasa Malaysia*** *Translation Of Headnotes*

Bapa perayu-perayu memiliki dua pertiga saham yang tidak berbahagi dalam dua lot tanah ('lot'). Baki satu pertiga saham yang tidak dibahagikan dalam lot dimiliki oleh ibu saudara perayu-perayu ('si mati') yang telah meninggal dunia di Indonesia pada tahun 1941 tanpa zuriat. Kira-kira 43 tahun kemudian, responden pertama memohon dan memperolehi perintah di bawah Ordinan Harta Pusaka Kecil (Pembahagian) 1955 untuk membahagikan saham tidak berbahagi si mati dalam lot kepada responden-responden pertama hingga keempat ('responden-responden'). Berikutan perintah pembahagian, responden-responden masing-masing diletakhak dengan 1/12 saham tidak berbahagi dalam lot. Responden-responden kemudian telah menjual dan memindah milik jumlah 1/3 saham tidak berbahagi mereka dalam setiap lot masing-masing kepada responden-responden kelima dan keenam. Perayu-perayu mengambil tindakan terhadap responden-responden di Mahkamah Tinggi untuk, antara lain, membatalkan perintah pembahagian dan mengenepikan pendaftaran satu pertiga saham dalam lot di atas nama responden-responden kelima dan keenam. Perayu-perayu mendakwa bahawa pihak responden telah memperolehi lot itu secara fraud dengan menuntut bahawa mereka adalah anak atau benefisiari si mati apabila memohon untuk perintah pembahagian. Perayu-perayu telah memperolehi penghakiman ingkar terhadap pihak responden atas kegagalan mereka untuk menentang tuntutan tersebut. Akibat daripada penghakiman ingkar tersebut, mahkamah bicara memutuskan

bahawa perintah pembahagian diketepikan dan fraud telah pun dibuktikan terhadap responden-responden tanpa keperluan untuk membuktikannya secara formal. Mahkamah bicara, walau bagaimanapun, memutuskan bahawa memandangkan responden-responden kelima dan keenam merupakan pembeli *bona fide* untuk nilai dan tidak dicemari dengan fraud, mereka telah memperolehi hakmilik yang tidak boleh disangkal dan kepentingan terhadap saham mereka masing-masing di bawah s. 340(3) Kanun Tanah Negara ('KTN'). Mahkamah Rayuan telah mengesahkan dapatan itu. Perayu-perayu, yang terkilan dengan keputusan itu, telah diberi kebenaran untuk merayu ke Mahkamah Persekutuan.

**Diputuskan (membenarkan rayuan; memerintahkan supaya saham tidak berbahagi responden-responden kelima dan keenam dalam lot dibatalkan daripada daftar dan dikembalikan kepada estet si mati)**

**Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:**

**(1)** Fakta bahawa responden-responden kelima dan keenam adalah pembeli *bona fide* tidak boleh memberikan mereka perlindungan tidak boleh disangkal. Mereka hanya boleh memperolehi hakmilik yang tidak boleh disangkal jika mereka merupakan pembeli *bona fide* terkemudian daripada pembeli semasa. Responden-responden pertama sehingga keempat, yang daripadanya responden-responden kelima dan keenam telah memperolehi hakmilik, bukanlah pembeli semasa. Mereka merupakan penyamar bagi orang yang berhak kepada harta pusaka si mati dan oleh itu, tidak mempunyai hakmilik untuk dipindahkan kepada responden-responden kelima dan keenam. Oleh itu, responden-responden kelima dan keenam merupakan pembeli-pembeli semasa dan telah memperolehi hakmilik yang bukannya tidak boleh disangkal dan apabila hakmilik bersifat fraud responden-responden pertama sehingga keempat diketepikan oleh penghakiman ingkar, hakmilik yang boleh disangkal responden-responden kelima dan keenam juga dipatahkan.

**(2)** Hanya pembeli terkemudian yang berhak untuk membangkitkan perlindungan tidak boleh disangkal. Pembeli semasa hakmilik yang dicemari oleh salah satu daripada unsur-unsur pembatalan seperti yang diperuntukkan dalam s. 340(2) KTN boleh memperolehi hakmilik yang bukan tidak boleh disangkal. *Bona fide* pembeli semasa bukanlah perlindungan kepada kebolehsangkalan

dan hakmilik yang boleh disangkalnya layak untuk diketepikan. Hakmiliknya yang boleh disangkal hanya menjadi tidak boleh disangkal apabila ia dipindahkan kepada pembeli seterusnya yang *bona fide*.

**(3)** Memandangkan fraud yang dituduh terhadap responden-responden pertama sehingga keempat tidak dijawab, mahkamah bicara wajar untuk memutuskan bahawa dengan adanya penghakiman ingkar, perayu-perayu tidak perlu membuktikan fraud terhadap responden-responden. Apabila penghakiman dimasukkan terhadap responden-responden, segala tuduhan fraud yang membangkitkan kausa tindakan, terangkum dalam penghakiman dan sehingga ia diketepikan, penghakiman tersebut merupakan bukti fraud yang tidak boleh dicabar terhadap responden-responden pertama sehingga keempat.

**(4)** Apabila hakmilik berdaftar atau kepentingan dipohon untuk diketepikan di bawah s. 340 KTN, mahkamah bicara perlu menentukan pada permulaannya sama ada hakmilik atau kepentingan yang dipertikaikan tersebut telah didaftarkan atas nama pembeli semasa atau pembeli terkemudian. Jika ia adalah pembeli semasa, maka *bona fide* pembeli semasa tidak akan memberi perlindungan tidak boleh disangkal dan hakmiliknya layak untuk diketepikan jika sebarang unsur-unsur pembatalan seperti yang diperuntukkan di bawah s. 340(2) KTN telah dibuktikan. Jika pembeli terkemudian, maka unsur-unsur pembatalan tersebut tidak akan mempengaruhi hakmilik atau kepentingan kecuali jika hakmilik atau kepentingan telah diperolehi oleh pembeli terkemudian dengan suci hati dan bagi balasan bernilai.

**Case(s) referred to:**

*Abu Bakar Ismail & Anor v. Ismail Husin & Ors and Other Appeals [2007] 3 CLJ 97 CA* ***(refd)***

*Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC* ***(refd)***

*AGS Harta Sdn Bhd v. Liew Yok Yin [2010] 7 CLJ 142 CA* ***(refd)***

*Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA* ***(refd)***

*Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA* ***(refd)***

*Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd [1999] 5 CLJ 112 HC* ***(refd)***

*Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC* ***(refd)***

*Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad Abang Anding [1979] 1 LNS 16 HC* ***(refd)***
*Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd (1974) 2 ALR 321* ***(refd)***
*Frazer v. Walker [1967] AC 569* ***(refd)***
*Liaw Watt Lee & Ors v. Baiduri Bank Bhd and Another Appeal [2010] 5 MLJ 551* ***(refd)***
*M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 BLJ 156 SC* ***(refd)***
*OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA* ***(refd)***
*Stokes v. Grissell (1854) 14 CB 689* ***(refd)***
*Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA* ***(refd)***
*Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC* ***(dist)***
*Williamson v. Ah On [1926] HCA 46* ***(refd)***

**Legislation referred to:**
National Land Code, ss. 258, 261, 340(2)(a), (b), (3)

**Other source(s) referred to:**
David Wong, *Tenure and Land Dealings in the Malay State*, p 374
Judith Sihombing, *The National Land Code, A Commentary*, Binder 3, Issue 25, XXVI 4454
Tan Sook Yee, *Principles of Singapore Law*, 3rd edn, p 285
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2nd edn, p 134

*For the appellants - H S Lee (Abdullah Sani Zainun with him); M/s Ashfar Ali & Assocs*
*For the 5th respondent - Mohammad Faiz Fadzil (Kamalniza Alias & Syafuan Zainudin with him); M/s Zulkafli, Husin & Co*
*For the 6th respondent - Ramzani Idris; M/s Haresh Mahadevan & Co*
*For the 7th respondent - Md Azhari Abu Hanit; Assistant State Legal Advisor*

*Reported by Ashok Kumar*

## JUDGMENT

### Jeffrey Tan FCJ:

**[1]** This is an appeal against the concurrent findings of the trial court and the Court of Appeal, which held that the fifth and sixth respondents were *bona fide* purchasers and that their title or interest in the lands hereinafter described were therefore protected by s. 340(3) of the National Land Code.

**[2]** Leave was granted to the appellants to appeal against the order of the Court of Appeal in respect of the matter decided by the trial court in the exercise of its original jurisdiction, on the following three "questions of law":

> (i) Apakah kesan Penghakiman Ingkar Kehadiran bertarikh 12.7.2005 yang mengenepikan serta merta Surat Kuasa Mentadbir harta pusaka si mati ke atas pindahmilik tanah si mati kepada Responden Kelima dan Keenam yang menggunakan Surat Kuasa Mentadbir tersebut;
>
> (ii) Apakah perlindungan yang diberi dibawah undang-undang termasuk Kanun Tanah Negara 1965 kepada harta pusaka si mati dan benefisiari sama ada dalam hakmilik Rizab Melayu dan sebaliknya;
>
> (iii) Sama ada pindahmilik hartanah kepada Responden Kelima dan Respondent Keenam di lindungi dibawah Kanun Tanah Negara 1965 khususnya seksyen 340.

**[3]** The aforesaid leave questions 1 and 3 could be rephrased in English as follows:

> What was the effect of the judgment in default, which set aside the letters of administration to the estate of the deceased, to the transfers of the lands of the estate of the deceased to the 5th and 6th Respondents?
>
> Whether the transfers of the lands of the estate of the deceased to the 5th and 6th Respondents were protected by section 340 of the National Land Code?

**[4]** We summarise the background facts as follows. The appellants were respectively the nephew and nieces of Saribu bte Badai (deceased). At the material time, the deceased was the registered co-proprietor of a 1/3 undivided share in lands held under EMR 3587 for Lot 2315 and EMR 6629 for Lot 2310, both in the Mukim of Dengkil, in the District of Sepang, Selangor (said Lots). The appellants' father, one Omar bin Badai, was the registered co-proprietor of the balance 2/3 undivided share in the said Lots. The deceased died in 1941, in Indonesia, without issue. Some 43 years later, the first respondent applied and obtained an order under the Small Estates Distribution Ordinance 1955 to distribute the undivided share of the deceased in the said Lots to the first to fourth respondents (see pp. 158-159 of the appeal record). Pursuant to the order of distribution, the first to fourth respondents on 18 April 1984 were each vested with a 1/12

undivided share in the said Lots. Not long thereafter, by memorandum of transfer dated 29 July 1985 (see 256AR) the first to fourth respondents transferred their total 1/3 undivided share in lot 2315 to the sixth respondent, in consideration of the sum of RM16,000. By memorandum of transfer dated 29 July 1998 (see 219AR) the first to fourth respondents transferred their total 1/3 undivided share in Lot 2310 to the fifth respondent, in consideration of the sum of RM25,000. Both memorandum of transfers were executed by the first respondent, first for himself and also as attorney for the second to fourth respondents.

**[5]** The appellants pleaded that the first to fourth respondents acquired title to the said lots by fraud and or misrepresentation, in that they falsely stated that they were the children or beneficiaries of the deceased when they applied for and obtained the order of distribution, and that the fifth and sixth respondents had therefore not acquired an indefeasible title. The appellants prayed for orders to cancel the order of distribution and to set aside the title or interest of the fifth and sixth respondents to the said lots. The appellants also pleaded that the seventh respondent (the governmental authority who granted the order of distribution) was negligent when it vested the 1/3 undivided share of the deceased to the first to fourth respondents. As luck would have it, the first to fourth respondents did not defend the claim. On 12 July 2005, the appellants obtained judgment in default against the first to fourth respondents: Suriyadi Halim Omar J, as he then was, ordered the immediate cancellation of the order of distribution dated 18 April 1984 (see 138-139AR).

**[6]** Hence, when trial commenced, the appellants had only to contend with the fifth and sixth respondents who pleaded that they had no knowledge of whatever fraud and that they were *bona fide* purchasers. All parties applied to dispense with oral evidence and to solely rely on affidavit evidence and legal submissions (see 43AR). Coincidentally, the trial court (not Suriyadi Halim Omar J) was of the view that with the entry of judgment, *albeit* in default, against the first to fourth respondents, all issue of fraud had been rendered irrelevant and therefore needed not to be proved against first to fourth respondents. The trial court granted the application to dispense with oral evidence but directed parties to submit on the implication of the default judgment to the claim and the defence.

**[7]** In its grounds of judgment, which were read out on 23 October 2009 (see 43AR), the trial court made the following pronouncements. The order of distribution was set aside by the default judgment. Therefore, under the *nemo dat* rule (the trial court cited *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539; [2005] 6 MLJ 120), the first to fourth respondents had no right to transfer the 1/3 undivided share in both lots to the fifth and/or sixth respondents. But the fifth and sixth respondents were *bona fide* purchasers for value, and their title or interest was protected by s. 340(3) of the NLC, as held by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 245. The Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 was distinguishable on the facts, as the default judgment was not a specific finding that fraud was committed by the first to fourth respondents in the distribution of the estate of the deceased to themselves - "Perintah Penghakiman Ingkar tersebut bukanlah suatu perintah Mahkamah yang memutuskan secara khusus bahawa defendan 1, 2, 3 dan 4 telah membuat pernyataan palsu/salah dan terlibat dengan penipuan atau perbuatan fraud dalam urusan pembahagian dan peletakan hak daripada pusaka si mati kepada mereka. Oleh itu kes ini boleh dibezakan daripada kes yang terbaru di putuskan oleh Mahkamah Persekutuan baru-baru ini".

**[8]** The aforesaid grounds of the trial court were read out on 23 October 2009. How the trial court could cite and even consider a case (*Tan Ying Hong*) that would be delivered *in futuro*, that is on 21 January 2010, is beyond us. But how the trial court could say that the first - fourth respondents had not committed or were not involved in fraud in the distribution of the estate of the deceased is even more perplexing, not only in the light of the established facts but also given the co-existing finding by the trial court that fraud needed not to be proved by the appellants against the first to fourth respondents. When the parties applied to dispense with oral evidence, principally on the ground that the appellants were too old to travel from Indonesia to Malaysia and that the fifth respondent had suffered a stroke, the trial court held:

> Mahkamah juga mendapat berbangkit daripada Penghakiman Ingkar Mahkamah terhadap Defendan 1, 2, 3 dan 4, isu fraud tidak lagi perlu atau relevan untuk dibuktikan oleh Plaintif terhadap Defendan 1, 2, 3 dan 4 oleh kerana penghakiman telah dimasukan terhadap mereka. (see 43AR)

**[9]** By that, the trial court clearly held that fraud had been made out against first to fourth respondents and so needed not to be proved. Indeed, when the first to fourth respondents failed to defend the claim, it should be assumed that the appellants had made out fraud against the first to fourth respondents. It would be against all good sense and logic, quixotic in fact, to hold that an allegation, although unanswered, must yet be proved. In *Datuk Patinggi Abdul Rahman Ya'kub v. Abang Mohammad Abang Anding* [1979] 1 LNS 16; [1979] 2 MLJ 185, where the plaintiff, who had obtained interlocutory judgment in default, applied for assessment of damages, Seah J, as he then was, duly assumed that all allegations in the statement of claim were deemed as proved.

> In assessing damages in this case, the court is placed in a predicament in that no evidence was given either by the plaintiff or the defendant. It follows that damages should therefore be assessed on the basis of the pleadings contained in the statement of claim. For the purpose of assessing damages in this case I would assume that all the allegations in the statement of claim are deemed to have been proved.

**[10]** When an allegation is unanswered, it must be assumed as proved, even if the party only swears to the best of his knowledge and belief (see *Williamson v. Ah On* [1926] HCA 46; 39 CLR 95 at p. 115, where the High Court of Australia cited *Stokes v. Grissell* (1854) 14 CB, at pp. 689 and 690, where Williams, J, said of chambers applications "Where the party swears to the best of his knowledge and belief as to a matter upon which from its nature he cannot swear positively if the affidavit is unanswered by the other side, I assume the fact to be proved").

**[11]** Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court at 43AR was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud by them needed not to be proved by the appellants. But later, the trial court expressed an inconsistent opinion. At 52AR, the trial court held, so as to distinguish *Tan Ying Hong*, that the default judgment was not a specific finding that the first to fourth respondents committed fraud in the distribution of the estate of the deceased to themselves. With respect, the judgment was the judicial decree that fraud by the first to fourth respondents had been made out. The cause of

action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court of Australia per Menzies J said "... the plaintiff's cause of action against the insured would merge in the judgment once it was obtained ...") and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd and Another Appeal* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed "that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead"). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.

**[12]** But there was not how it was perceived by the trial court who applied *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 245 and held that although the first to fourth respondents had no right to transfer title or interest to the fifth and sixth respondents, the fifth and sixth respondents had yet acquired an indefeasible title or interest, as they had not acquired their title or interest by fraud.

> Walaupun Defendan 1, 2, 3 dan 4 nyata tidak mempunyai apa-apa hak untuk pindah hakmilik bahagian hartanah berkenaan kepada pembeli Defendan 5 dan 6, sekiranya hakmilik hartanah tidak diperolehi oleh kedua Defendan 5 dan 6 melalui fraud, pemalsuan, atau instrument yang terbatal, mereka tetap memperolehi hakmilik yang tidak boleh di sangkal ke atas hartanah tersebut.

**[13]** The Court of Appeal found fraud on the part of the first to fourth respondents, but held that the fifth and sixth respondents, in absence of fraud on their part, had acquired an indefeasible title or interest.

> Kami juga bersetuju dengan hakim perbicaraan fakta bahawa pihak plaintif memperolehi penghakiman ingkar terhadap defendan pertama hingga keempat yang menjadikan perpindahan tanah tersebut melalui perintah pembahagian yang dimaksudkan tidak sah

tidaklah menjejaskan hakmilik dan kepentingan defendan kelima dan keenam ke atas tanah mereka masing-masing kecuali jika terbukti mereka terlibat dan menjadi pihak dalam fraud yang dilakukan oleh defendan-defendan yang di sebut terdahulu. Sebagaimana yang kami putuskan terdahulu tidak terdapat apa-apa bukti sedemikian.

Kesimpulannya, kami bersetuju dengan hakim perbicaraan bahawa walaupun telah berlaku fraud dalam perpindahan tanah tersebut dari pusaka si mati kepada defendan pertama hingga keempat tetapi tiada bukti yang menunjukkan defendant kelima dan keenam terlibat dan menjadi pihak dalam perlakuan fraud tersebut. Mereka kekal sebagai pembeli suci hati dengan balasan bernilai yang memperolehi hakmilik seterusnya berikutan perlakuan fraud oleh defendan pertama hingga keempat tersebut. Dengan yang demikian, pada pendapat kami defendan kelima dan keenam dilindungi oleh ketakbolehsangkalan tertunda (deferred indefeasibility) yang di maksudkan dalam kes *Tan Ying Hong*, *supra*.

**[14]** In a word, both the trial court and the Court of Appeal held that the title or interest of the fifth and sixth respondents, in the absence of fraud on their part, was protected by s. 340(3) of the NLC, which reads, the whole of s. 340, as follows:

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

A (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for B valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

C (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of D law.

**[15]** On the matter of interpretation of s. 340, two cases (*Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and *Tan Ying Hong*) stand out, for different reasons. While *Adorna Properties* E *Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 iconoclastically changed the law, *Tan Ying Hong* restored it to where it was before. Before *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133, the law on s. 340 could be broadly summarised as follows. "Upon registration, the party in whose F favour the registration has been effected will obtain an indefeasible title to or interest in the land, that is a title or an interest which is free of all adverse claims or encumbrances not noted on the register. The effect of registration then is to defeat all prior unregistered claims. Indefeasibility is however not absolute ... " G (*Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood & Khaw Lake Tee, 2nd edn. at p. 134). Indefeasibility is subject to the exceptions in s. 340(2). Under s. 340(2), the title or interest shall not be indefeasible (a) in any case of fraud or misrepresentation to which the person or body, or any agent of H the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. A title or I interest that is not indefeasible continues to be defeasible and is "liable to be set aside in the hands of any person or body to whom it may subsequently be transferred" (s. 340(2)(a)) and any interest subsequently granted thereout is "liable to be set aside in

the hands of any person or body in whom it is for the time being vested (s. 340(2)(b)). A defeasible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso to s. 340(3)).

**[16]** *Tenure and Land Dealings in the Malay States* by David Wong at p. 374 put it as follows:

> When a registered title or interest in land is rendered defeasible in any of the circumstances considered above, it is liable to be set aside not only in the hands of its immediate holder but also in the hands of any person to whom it may **subsequently be transferred**; so is any lesser interest subsequently granted thereout. But, such continuing defeasibility will end with respect to any title or interest when it comes to be acquired by "any purchaser in good faith and for valuable consideration" in whose hands the title or interest will be cured of its past defeasibility, which accordingly will also not affect any person "claiming through or under such a purchaser". All this is stated in section 340(3). Thus, so long as a defeasible title or interest remains on the register and has not been set aside, it is capable of subsequent dealings by its holder. And, indeed, it can be a root of good title **in favour of any subsequent purchaser "in good faith and for valuable consideration."** (emphasis added)

**[17]** That the proviso to s. 340(3) only applies to a subsequent purchaser was demonstrated in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196, where the registered proprietor alleged that she was induced by the fraud and undue influence of the first and second appellants to transfer her land to the second appellant. The second appellant later transferred the land to the third appellant. The land was subsequently transferred to a land development company almost wholly owned by the first appellant. Eventually, the land was subdivided and sold to the public. The High Court found that the appellants were guilty of fraud, breach of agreement and undue influence. On appeal, the Federal Court observed that for the respondent to succeed against the third appellant, she had to impeach the title of the second appellant and to prove that the third appellant was not a *bona fide* purchaser, which is to say that the proviso to s. 340(3) only applies to a subsequent purchaser.

> Arul was protected, so he thought, because he was a registered proprietor. The evidence that he was in fact a nominee and therefore not a *bona fide* purchaser for value was never allowed

to surface but kept in doubt before Syed Othman, J., as he then was, when Arul claimed possession of the land in *Arul Chandran v. Tara Rajaratnam* [1979] 2 MLJ 172. In the light of the recent amendment made by Arul to his defence and other evidence we cannot say the learned Judge was wrong to say that not only Syed Othman, J. but also Anuar, J.C. were misled into believing that Arul was a *bona fide* purchaser for value of the property. It is difficult to accept that a lawyer of his experience knew nothing of the matter on July 31, 1975 but came to know of something only in January, 1977. Even then he chose to cover up the matter. In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. *Under the National Land Code in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.* (emphasis added)

So as a *bona fide* purchaser for value as he had alleged until the mid-trial amendment of his defence Arul was protected although his vendor or any predecessor in title might have acted in bad faith. That is to say even though Suppiah or Jagindar had acted in bad faith Arul was protected. **If Arul had admitted that he was not a *bona fide* purchaser for value he would not have been protected** and the respondent would have a better chance of recovering her property. Jagindar, Suppiah and Arul all knew perfectly well that although on the face of it Arul was a registered proprietor in actual fact he was merely a nominee or trustee for Jagindar and therefore not a *bona fide* purchaser for value as claimed all along till the amendment. In other words, they had all along misled Syed Othman, J. and Anuar, J.C. to the detriment of Tara. They had no justification to mislead the courts into believing that Arul was a *bona fide* purchaser for value when he was a mere nominee." (emphasis added)

**[18]** In *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 BLJ 156; [1994] 1 MLJ 294, the appellant, who was the successful bidder in the judicial sale of a charged property, paid a 25% deposit of the total purchase price as provided under the conditions of sale, but failed to pay the balance within 30 days from the date of sale. The successful bidder obtained an order for the completion date to be extended. The chargor, who was not made a party in the application for extension of time for payment, applied for and was granted leave to intervene to set aside the order for extension of time for payment. A year after the date of completion, the successful bidder forwarded the balance sum to the Registrar of the court who accepted the payment and

issued the certificate of sale to the successful bidder who presented the certificate for registration. The High Court declared the deposit forfeited, annulled the certificate of sale issued by the Registrar and cancelled the registration of transfer in respect of the property. The High Court also made orders for the return of the issue document of title and ordered resale. On appeal, the Federal Court per Wan Yahya SCJ, as he then was, delivering the judgment of the court, held that there was a failure to comply with ss. 258 and 261 of the NLC. On ss. 340(2) and (3), Wan Yahya SCJ ruled that an immediate purchaser only acquires a defeasible title or interest:

> Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.
>
> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had – *nemo dat quod non habet*. There are, however, important exceptions to this [*nemo dat*] rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, – see *Gibbs v. Messer* 16. Under this principle, the registration of the insufficient or void instrument can be set aside.
>
> It would appear, however, from the facts in this appeal that the challenge on the indefeasibility of the purchaser's interest could appropriately be dealt with under para (b) and (c) of s 340(2) of the NLC.
>
> In *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd* 17, Edgar Joseph Jr J (as he then was) when dealing with the effect of registration obtained by means of a void and insufficient instrument, said:

> In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted *ultra vires* the powers conferred upon him: s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu v. Radha Krishma*, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be *ultra vires* and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v. Ashak Kumar Chopra*.
>
> ... In our present appeal, failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of s 261(1) of the NLC is not just a case of non compliance with some practical guidelines in the Code - a mere irregularity - but it is an illegality which strikes at the root of the proprietor's right to be heard.
>
> ...
>
> In any event, we are satisfied that the certificate issued by the SAR was *ultra vires* the statutory provision of the NLC and the title was unlawfully acquired by the purchaser. **This finding by itself would have rendered the title of the purchaser defeasible under para (c) of s 340(2) of the National Land Code** and under such circumstances the learned judge had arrived at a correct decision when he made the order. (emphasis added)

**[19]** Perhaps the most clear-cut statement that the proviso to s. 340(3) applies only to a subsequent purchaser and not to the immediate proprietor who has a title that is defeasible by one of the vitiating elements in s. 340(2) was made in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 MLJ 62, where Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, said:

> It follows from what we have said in the preceding paragraph - and this is the fourth reason we advance for disagreeing with the learned judge - that s 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of land.

> The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. *In our judgment, the words 'any purchaser' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s 340 of the NLC.* Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come into the register after him, take title free of any taint. (emphasis added)

**[20]** In *Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd* [1999] 5 CLJ 112; [1999] 1 MLJ 310, NH Chan JCA, delivering the judgment of the High Court, agreed with Sri Ram JCA that forgery affects the immediate proprietor even if he be an innocent purchaser for value. And for good measure, His Lordship aptly highlighted that the Malaysian Torrens system is different from those where *Frazer v. Walker* [1967] AC 569 applies.

> In this country, we do not have ss 62 and 63 of the Land Transfer Act of New Zealand. Instead, we have s 340 of the NLC and by s 340(2)(b) where the registration was obtained by forgery, it becomes defeasible and can be set aside (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62. See Dr David Wong, *Tenure and Land Dealings in the Malay States* at p 361:
>
> > Forgery as a ground for vitiating a registered title, as set out in s 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v. Walker* [1967] AC 569 applies.
>
> And a little further down it goes on to say:
>
> > It will be realized that 'forgery' under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act also expressly sets out 'forgery' as an exception to indefeasibility, but places 'forgery' side by side with 'fraud' subject to the same limitation, *viz*, that for a registered title to be vulnerable in either case the proprietor (or his agent) must be a party to or have colluded in the

A 'fraud' or 'forgery'. This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be an innocent purchaser for value.

*Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 (which was also relied on by counsel for the defendant) was not a case where the registration of the title was defeasible because it was obtained by forgery under s 340(2)(b) of the NLC. It was in fact a case where the protection afforded by the proviso to s 340(3) of the NLC to a subsequent purchaser applied. There, Doshi was previously the registered owner of the land. He borrowed from Chooi Mun Sou RM130,000 and as collateral security for repayment of the loan, he deposited with Chooi the document of title of the land together with a blank transfer form which was executed by him as transferor. The loan (which carried interest) was to be repaid within three months. When Doshi failed to repay the loan, Chooi transferred the land to Nominees Sdn Bhd which subsequently sold the land to Yeoh Tiong Lay who became the registered proprietor of the land. Gill CJ (Malaya) (with whom Raja Azlan Shah and Wan Suleiman FJJ agreed) said at p 87:

> Turning next to the merits of the case, the learned judge took the view that as the plaintiff [Yeoh Tiong Lay] was for the time being the registered proprietor of the premises, for his title to be defeated under s 340(2)(a) of the Code, the onus was on the defendant [Doshi] to show that the plaintiff was a party or privy to fraud either by Chooi Mun Sou in transferring the land to the nominee company or by the nominee company in transferring the land to the plaintiff. In this connection, he found that no particulars of fraud had been set out in the defence which merely alleged that at the time of the sale of the premises to him, the plaintiff had knowledge of the illegality of the loan agreement and notice that the instrument of transfer from Chooi Mun Sou to the nominee company was void. Proceeding upon the premises that the plaintiff was an independant and *bona fide* purchaser not bound by any special relationship to either Chooi Mun Sou or the nominee company, he found that the defendant had failed to satisfy the court that he had a *prima facie* defence. He also found that the defendant had failed to provide any evidence to show that the plaintiff had not acted in good faith when he caused himself to be registered as proprietor.

The Chief Justice (Malaya) went on to say:

> As regards the counterclaim, the learned judge found that the allegations therein were directed essentially against Chooi Mun Sou and the nominee company. Assuming that fraud, if any, was committed by either of them, the course open to the defendant was to seek a remedy against either of them or both, but that in so far as the plaintiff's claim was concerned such fraud could not defeat the plaintiff's title.

And he concluded thus (at pp 88–89):

> Assuming that the loan agreement was illegal so that for that reason the transfer from Chooi Mun Sou to equitable nominees was void, and assuming that that transfer was also void because of the falsity of the attestation clause, registration of the transfer from equitable nominees to the respondent [Yeoh Tiong Lay] was effective to vest title in him as a registered proprietor notwithstanding that he acquired his interest under an instrument that was void (see *Frazer v. Walker* [1967] 1 All ER 649).'

In other words, even assuming the title of equitable nominees was defeasible for fraud (under s 340(2)(a)) or because it was obtained by a void instrument (under s 340(2)(b)), since it was not set aside before it was transferred to Yeoh Tiong Lay as a subsequent purchaser, the title of Yeoh was protected by the proviso to s 340(3) of the NLC. The decision of the Federal Court was right. It was unfortunate that Gill CJ (Malaya) had applied the wrong judicial authority to support his judgment when in fact the answer was staring him in the face right here in the proviso to s 340(3) all the time. See Gopal Sri Ram JCA in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 where he said at pp 85–86:

> It follows from what we have said in the preceding paragraph - and this is the fourth reason we advance for disagreeing with the learned judge - that s 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of the land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words 'any purchase' appearing in the proviso to s 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second sub-s to s 340 of the Code. Any other construction would, in our view, denude sub-s (2) of all effect. The section should be read

A as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith pays the purchase price, then, the latter, as well as all those who come onto the register after B him, take title free of any taint.

**[21]** And in *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949; [1999] 2 MLJ 511, NH Chan JCA repeated that the proviso to s. 340(3) applies C exclusively to s. 340(3):

"What it means is this: Where a registered title or interest is rendered defeasible by reason of any of the circumstances specified in s 340(2), the title (in the hands of any person) to whom it is subsequently transferred may still be liable to be set aside under D s 340(3)(a) and any interest (for example, any charge or lease) subsequently granted thereout by the subsequent proprietor or holder in s 340(3)(a) is also liable to be set aside under s 340(3)(b). This is because the grantee in such a case is a person in whom the interest is for the time vested (see E s 340(3)(b). However, if the subsequent proprietor or holder in s 340(3)(a) is a purchaser in good faith and for value his title or interest will be indefeasible because the proviso to s 340(3) will then apply to him.

For example, see *Doshi v. Yeoh Tiong Lay*. Doshi was the F previous registered owner. He borrowed from Chooi Mun Sou RM130,000 and he deposited with Chooi the document of title of his land together with a blank transfer form which he had signed as transferor. When Doshi failed to repay the loan when it became due, Chooi transferred the land to Equitable Nominees Sdn Bhd G which subsequently sold it to Yeoh Tiong Lay who became the subsequent registered proprietor of the land. In that case even assuming the title of the immediate proprietor Equitable Nominees was defeasible under s 340(2), it was transferred to a subsequent purchaser Yeoh (see s 340(3)(a)). In such a case the title which is now in the hands of the subsequent purchaser Yeoh would still H be liable to be set aside (under sub-s (3)(a)) unless it is protected by the proviso to sub-s (3). In that case, Yeoh was protected by the proviso to s 340(3), he being a purchaser in good faith and for valuable consideration.

We must reiterate that the proviso to s 340(3) applies exclusively I to those situations which are covered by sub-s (3) which is that s 340(3) will only take effect after the immediate registered proprietor or holder in s 340(2) has transferred his defeasible title or interest to someone else (see s 340(3)(a)).

Is there then any difference between the two sets of situations in s 340(2) and s 340(3)? The difference is this: In s 340(2) where a registered title or interest is rendered defeasible by reason of any of the circumstances set out in s 340(2), that title or interest in the hands of the immediate registered proprietor or holder of an interest (for example, any charge or lease) is liable to be set aside. And any interest granted by such immediate proprietor or holder is also liable to be set aside. In effect, s 340(2)(a) and (b) affect the immediate proprietor, chargee or lessee even if he be a purchaser for value under sub-s (2)(a), or, an innocent purchaser for value under sub-s (2)(b). It is important to be reminded that there is no proviso to this subsection. On the other hand, s 340(3) applies only to a situation after the immediate registered proprietor or holder in s 340(2) has transferred his defeasible title or interest to someone else. The result will be virtually the same in s 340(3) as in s 340(2) but for one important difference. Under s 340(2) the title or interest in the hands of the immediate registered proprietor or holder of an interest in the land (such as a charge or a lease) is liable to be set aside. But, in s 340(3) although the title or interest which is in the hands of the subsequent purchaser is also liable to be set aside, the subsequent purchaser has the benefit of the protection of the proviso to sub-s (3) which the immediate proprietor or holder in s 340(2) does not have.

**[22]** Mokhtar Sidin JCA delivered a separate judgment but agreed that the title of an immediate purchaser is defeasible if tainted by one or more of the vitiating elements set out in s. 340(2):

We gave our decision after hearing the arguments and submissions on both sides. Relying on the decision of the Court of Appeal in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, we dismissed the appeal by the appellant and confirmed the decision of the learned Judicial Commissioner. In *Boonsom Boonyanit*, the appellant was a Thai national who owned property in Penang. An unknown person, claiming to be the appellant, procured a certified true copy of the appellant's land title from the National Land Registry by claiming to have lost the original documents and subsequently procured a forged passport in the appellant's name and duly sold the property to the respondent for valuable consideration. The appellant discovered the ruse but only after the respondent was registered as owner of the property. The appellant sued the respondent in order to have her name restored on the register as the owner of the property. The respondent argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s 340 of the National Land Code. The High Court ruled in favour of the respondent. On

appeal, the Court of Appeal allowed the appeal. It was held that the words 'any purchaser' in s 340 of the National Land Code refers to a subsequent and not to an immediate purchaser, hence creating a deferred indefeasibility which benefits subsequent purchasers. The title of an immediate purchaser is defeasible if tainted by one or more of the situating elements set out in s 340(2) but creates an exception in favour of a *bona fide* purchaser who takes his title from such a registered proprietor. This bifurcation makes it clear that Parliament intended to confer deferred and not immediate indefeasibility. The Court of Appeal held that the trial judge had erred in his reliance upon the case of *Frazer v. Walker* [1967] 1 AC 569 which turned upon the construction of a particular New Zealand provision which is fundamentally different in wording from s 340 of the Code. It went on to say that on a proper construction of s 340, a registration obtained by forgery is of no effect. When s 340 is read as a whole and in context with ss 292 and 304 of the Code, it is clear that there can be no registration without an instrument. Hence, one of the ways in which to defeat a registration is by impugning the very instrument of transfer by means of which the registered proprietor obtained his title. If the instrument was forged or by other reason was insufficient or void, the title of the registered proprietor may be set aside. The Court of Appeal then set aside the learned judge's decision and restored the registered proprietorship to the appellant and set aside the registration of the respondent as the proprietor.

**[23]** "The traditional view, up till *Boonsom*, was that the proviso had been inserted into sub-s. (3) rather than sub-s. (2) for a special purpose; namely that of enabling the court to decide which of two innocent parties, where neither's interest is to be preferred over the other and both claim the same land, is to be favoured" (*The National Land Code, A Commentary* by Judith Sihombing, Binder 3, Issue 25, XXVI 4454). But that traditional view was torn asunder by *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133), where the Federal Court held that the proviso to sub-s. 340(3) applies also to sub-s. 340(2), such that a purchaser of a title or interest which is defeasible by any one the vitiating elements specified in s. 340(2), acquires an indefeasible title or interest. In short, *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133) disregarded the exceptions to indefeasibility and ruled instead in favour of indefeasibility upon registration, only save and except where the immediate purchaser is not a *bona fide* purchaser. The jurisprudence that had been so painstakingly developed to reach the state of being trite was cast aside overnight.

**[24]** The decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 was not well received. *The National Land Code, A Commentary* by Judith Sihombing, Binder 3, Issue 25, XXVI 2.1 thus commented:

> The surprising, decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241, if (as seems to be the general consensus) necessarily of universal application, has produced a drastic and radical change in the manner in which section 340 is to be interpreted. This is because the court held that section 340 provides for immediate indefeasibility, and that the proviso to section 340(3) applies to subsection (2). This view is contrary to that expressed with detailed analysis and reasoning by the Court of Appeal in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 which affirmed that section 340 provided for deferred indefeasibility, and that the proviso to subsection (3) did not apply to subsection (2). Apart from referring to the decisions contained in the High Court ([1995] 2 MLJ 863) and the Court of Appeal judgments, the Federal Court did not refer to any Torrens authorities to assist in the understanding why it was to be held that there was to be a radical alteration of the type of indefeasibility which prevails in Peninsular Malaysia. It should also be noted that the Federal Court in *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2006] 2 MLJ 417 reaffirmed the correctness of the 2001 judgment, thereby indicating that the view of the Court of Appeal in 1997 was not to be accepted. However, subsequent to the 2006 decision, several benches of the Court of Appeal (whilst not always unanimous decisions) have been able to by-pass the 2001 decision (and its confirmation in 2006) on the basis that section 340(2) was relevant rather than section 340(3). Accordingly, when the court could not avoid applying *Boonsom*, the *bona fides* of the person, registered adversely to the true owner, are to be questioned. It is said that *Boonsom* (above) was delivered *per incuriam* due to the combination of the proviso to subsection (3) when interpreting subsection (2). There has been no shortage of judicial and non-judicial pronouncements to the effect. Consequently on the basis of *stare decisis*, it should be avoided. These cases rightly decided that subsection (2)(b) was concerned with the registration of a party using a forged instrument; and that subsection (3) proviso was concerned with a subsequent party who took from the registered proprietor whose title might have been obtained through a forged, void or insufficient instrument. On this see *Subramaniam a/l NS Dhurrai v. Sardrakasan a/l Ratnasamy* [2005] 6 MLJ 120, CA; *Abu Bakar bin Ismail & Anor v. Ismail bin Husin & Ors* [2007] 4 MLJ 489, CA; and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 MLJ 136, CA.

**[25]** Put bluntly, many courts refused to follow *Adorna Properties* [2001]. Thus in *Subramaniam NS Dhurai v. Sandrakasan Retnasamy* [2005] 3 CLJ 539; [2005] 6 MLJ 120, the Court of Appeal, by a majority (per Gopal Sri Ram JCA, as he then was, and Denis Ong JCA), held that *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 was not binding authority:

> ... section 340 should as the title of a registered proprietor is indefeasible and good against the whole world. But it is not indefeasible in cases where it has been obtained by fraud, forgery, by means of an insufficient or void instrument, or by the exercise of a power purportedly conferred by written law. If a title is acquired by any of these means, then the title of the acquirer is liable to be set aside in the hands of the acquirer and all those to whom he transfers the land except a *bona fide* purchaser for valuable consideration. However, the fact that the title of a registered proprietor is indefeasible does not prevent the land from being forfeited or sold under a statutory power. Neither does it prevent the title being defeated by operation of law.
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> It was on this basis that *M & J Frozen Foods Sdn Bhd v. Siland Sdn Bhd*, citing *Gibbs v. Messer* [1891] AC 248 as authority, that an acquirer who obtains his title by means of a void or voidable instrument obtains deferred indefeasibility. Accordingly, where title is acquired by means of a forged instrument of transfer, the title of the acquirer may be set aside in his hands even if he is a *bona fide* purchaser. However, the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 1 MLJ 241, held that s 340 of the Code admitted immediate as opposed to deferred indefeasibility (see para 12).
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> ...
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> It is plain that the Federal Court in the *Adorna Properties* case did not have regard to the earlier decision of the Supreme Court in *M & J Frozen Foods*. Worse, it did not have regard to s 5 of the Code. I do not think that I should fall off the proverbial cliff. I think that I must strike out in the right direction.
>
> I take this view because the consequences of the judgment in *Adorna Properties* are startling. As a registered proprietor you can cling on to your issue document of title for dear life. Yet a rogue may by the use of forged documents obtain a duplicate of the issue document of title claiming the original to be lost and sell and transfer your land to a perfectly innocent purchaser. That is what happened in the *Boonsom Boonyanit* case. Yet, according to the judgment of the Federal Court, you cannot recover your property. The problem has arisen because, as I have already said, the

Federal Court ignored the definition of 'proprietor' and 'purchaser' in s 5 of the Code and also did not have regard to the *M & J Frozen Foods* case. If the Federal Court had hearkened to written law and to precedent, the steps of logical reasoning would have been as follows.

Pursuant to s 340(1) of the Code, Adorna Properties was the proprietor 'for the time being registered', that is to say, at the date on which Boonsom Boonyanit claimed title to the land as true owner. At that point in time Adorna Properties had obtained its title under a forged instrument. About that there was no doubt. Accordingly, *Adorna*'s case fell within s 340(2)(b) of the Code because 'registration was obtained by forgery, or by means of an insufficient or void instrument'. Therefore Adorna's title was defeasible. Put shortly, Adorna was the registered proprietor under s 340(1) and not a purchaser within the proviso to s 340(3).

By contrast, if Adorna had later sold and transferred the land to a third party, X, then s 340(2)(b) would not be applicable because the transfer would not be a forgery. X's title would be protected by the proviso to s 340(3) if X paid value and acquired the land without notice of the forged transfer in Adorna's favour. This points to deferred and not to immediate indefeasibility.

Accordingly, in my judgment our courts should no longer treat themselves bound by the Federal Court judgment in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* as it was decided *per incuriam*. It follows that this court and the High Courts must now proceed on the basis that the Code provides for deferred and not immediate indefeasibility.

**[26]** Later, in *Abu Bakar Ismail & Anor v. Ismail Husin & Ors and Other Appeals* [2007] 3 CLJ 97; [2007] 4 MLJ 489, Gopal Sri Ram JCA, as he then was, repeated that *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 was not binding authority:

It is to be noted that when carefully read, s 340(2)(a) entitles a plaintiff to defeat the title of a registered proprietor - or a registered chargee as in the present instance - in two very distinct circumstances. He or she may, in the first place, succeed by showing that the registered proprietor was a party or privy to the fraud in a given case. Assuming a plaintiff cannot show this he or she is not out of court. For, he or she may, in the second place, succeed by showing that the registered proprietor's agent was party or privy to the fraud or misrepresentation in question. The section does not require that the registered proprietor must have knowledge or notice of the agent's fraud or authorise the commission of it. I would here very respectfully adopt as my

own, the words of GP Selvam J in *United Overseas Finance Ltd v. Victor Sakayamary* [1997] 3 SLR 211, uttered when considering the equipollent provision s. 46(2)(a) of the Singapore Land Titles Act (Cap 157, 1994 Ed):

> Aside from that, the rule enunciated in *Halsbury's Laws of England* and applied in *Doshi v. Yeo Tiong Lay*, in my view, does not apply in the context of s 38(2)(a) (now s 46(2)(a)) of the Act because the section in clear language abrogates the restricted rule as regards the agent's fraud. It expressly provides that the title of a proprietor may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party or in which he or his agent colluded. The section places no restriction that the wrongful act must be authorized by the principal. There is a simple rationale for this rule: a proprietor when he asserts a right, title or interest, as distinct from when he seeks to avoid a liability, founds his claim on the acts done and knowledge acquired by his solicitor or other agent. If the solicitor or agent has acted fraudulently the proprietor inevitably will found his action on, and benefit by, the fraud of his solicitor or agent. The law cannot allow the proprietor such benefit as he appointed the agent and he is bound by his agents' acts and knowledge. It would be an affront to common sense to hold that the proprietor can acquire an indefeasible title because the fraud or illegality was not that of the proprietor but his agent. The Federal Court, in my respectful view, without justification, ignored words to the same effect in the Malaysian Land Code. *Assets Co Ltd v. Mere Roihi* 1905 AC 176 which was referred to by the Federal Court expressly recognized that fraud of an agent would defeat the title of the principal.

…

There is another ground on which the plaintiffs' appeal has been argued. It is said that the instrument by which the charge was created being a forgery as expressly found by the learned trial judge, the fourth defendant takes no title. The learned judge quite correctly treated himself bound on this part of the case by the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 1 MLJ 241. In that case the Federal Court held that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him falls within a category of registered proprietors who obtain immediate indefeasibility notwithstanding that they acquired their title under a forged instrument. I have in *Subramaniam v. Sandrakasan* [2005] 6 MLJ 120 set out the reasons why the

Federal Court's judgment in *Adorna Properties* must be disregarded. I need add only one further comment to what I have already there said.

Section 340(3) tells us what happens to the title of a registered proprietor who has acquired it, *inter alia*, by means of fraud, forgery or an insufficient or void instrument. And this is how it puts it:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

Note that sub-s (3) in paras (a) and (b) employs the word 'subsequently'. What it means is this. If a registered proprietor gets on the register by any of the means set out in s 340(2), and if he or she to use the expression housed in the Code - subsequently - transfers his or her land to another, the title of that other is also defeasible unless he or she is a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it. See, *Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA 115; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224; *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 MLJ 320.

Since writing this judgment in draft, I have had the advantage of reading the valuable concurrence of my learned brother Raus Sharif JCA. I understand and appreciate my learned brother's reluctance to depart from *Adorna Properties* as it is a decision of the Federal Court. I would have joined in his view had *Adorna Properties* declared a principle of the common law based on policy considerations as was the case of *Donoughue v. Stevenson* [1932] AC 562. But *Adorna Properties* is not such a case. It is a case involving the interpretation of a provision in a statute, namely,

A s 340 of the Code which I have demonstrated in *Subramaniam v. Sandrakasan* to have been done without having regard to another provision in the Code and without reference to the decision of the Supreme Court in *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 which held that the Code creates deferred and not immediate indefeasibility.

B

**[27]** Soon after *Abu Bakar bin Hashim*, the Court of Appeal (Raus Sharif and Hasan Lah JJCA, as they then were) in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136, urged the Federal Court to review its decision in *Adorna*
C *Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133:

> ... it is my respectful view that the Federal Court should review its decision in *Adorna Properties*. To me, by virtue of s 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does
D not apply to s 340(2). The proviso states 'Provided that in this subsection' and this subsection refers to s 340(3) and not s 340(2). Section 340(3)(a) refers to 'to whom it may subsequently be transferred' which means that the intended purchaser is the subsequent purchaser and not the immediate
E purchaser.
>
> Similarly, in the instant case, the title of the first defendant is defeasible as the registration was obtained by forgery. The first respondent was the immediate purchaser and not a subsequent purchaser. Section 340(3) has no application as it refers to
F subsequent purchaser and not the immediate purchaser. Thus, the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s 340 of the Code in *Adorna Properties*. But for the reasons given earlier, I am not ready to ignore or disregard the Federal Court's decision in *Adorna*
G *Properties*.

**[28]** Raus Sharif JCA, would repeat in *AGS Harta Sdn Bhd v. Liew Yok Yin* [2010] 7 CLJ 142; [2010] 1 MLJ 309 that *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 was wrongly decided:

H

> The decision of the Federal Court has no doubt placed registered owners of landed properties in jeopardy. The effect of that decision is that land owners may, one morning, find themselves no longer owning their landed properties without any fault or
I knowledge on their part. Thus, it is not surprising that the decision had been heavily criticised. To some, the Federal Court's decision was plainly wrong and should be disregarded (see *Subramaniam a/l NS Dhurai v. Sandrakasan a/l Retnasamy & Ors*

[2005] 6 MLJ 120, *Au Meng Nam v. Ung Yak Chew & Ors* [2007] 5 MLJ 136 and an article *Demise of Deferred Indefeasibility under the Malaysian Torrens System* by Associate Professor Teo Keang Soo, Faculty of Law, National University of Singapore [2002] Singapore Journal of Legal Studies 403–408.

**[29]** Change was in the ascendant. And change came, though perhaps not soon enough to some, with the decision in *Tan Ying Hong*, where the appellant was the registered proprietor of land charged to the third respondent bank, to secure loans made in favour of the second respondent. The first respondent, who purported to act under a power of attorney, had charged the land in favour of the third respondent. The appellant only became aware of the charge when he received a notice of demand from the third respondent. The appellant claimed that he had not signed the power of attorney, that the power of attorney was forged and that the charge instruments executed in favour of the third respondent were void. The High Court found that the appellant had never granted the power of attorney to the first respondent and that the first respondent had therefore no authority to charge the land to the third respondent. However the High Court found itself bound by *Adorna Properties Sdn Bhd v. Boonsom Booyanit* [2001] 2 CLJ 133, which meant that despite the finding that registration of the charge was obtained by fraud or forgery, it was held that the third respondent had obtained an indefeasible title. That decision was affirmed by the Court of Appeal. On further appeal to the Federal Court, the sole question was whether an acquirer of a registered charge or other interest or title under the NLC by means of a forged instrument acquires an immediate indefeasible interest or title.

**[30]** Ariffin Zakaria, Chief Judge of Malaya, as he then was, who delivered the main judgment of the court, first outlined the law before *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133.

Before the decision of *Adorna Properties* the prevailing view was that s 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was confirmed by the Federal Court in *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53. This is further reinforced by the Supreme Court's decision in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. There the Supreme Court, comprising of Abdul Hamid Omar LP, Edgar Joseph Jr and Wan Yahya SCJJ held that indefeasibility can be rebutted not

A only by fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

In that case, it was held that failure to comply with the statutory requirements of paras (a) and (b) of s 258 and para (c) of
B s 261(1) of the NLC was not just a mere irregularity, but was an illegality which struck at the root of the first respondent's right to be heard. Therefore, the certificate issued by the Senior Assistant registrar was *ultra vires* the statutory provisions of the NLC and the title was unlawfully acquired by the first appellant.
C The title of the first appellant was defeasible under s 340(2)(c) of the NLC and the learned judge had arrived at a correct decision when he made the order for the cancellation of the registration of the transfer.

The above position is reflected in the judgment of the Court of
D Appeal in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17. This was followed by another panel of Court of Appeal in *OCBC Bank (M) Bhd v. Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511; [1999] 2 CLJ 949.

E **[31]** His Lordship thus commented on the effect of the *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and the criticism that it attracted:

That was the position prior to the decision of this court in *Adorna*
F *Properties*. In *Adorna Properties*, the respondent was the registered proprietor of a piece of land which had been sold and transferred to the appellant. The respondent claimed that the vendor had forged her signature, sold and transferred the land to the appellant. The High Court dismissed the respondent's claim. The decision of the High Court was reversed by the Court of Appeal.
G The appellant appealed. The questions of law posed for decision of this court were:

(a) whether the standard of proof to prove forgery is on balance of probabilities or beyond reasonable doubt; and

H (b) whether the appellant, a *bona fide* purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s 340(3) of the NLC.

This court in a panel comprising of Eusoff Chin Chief Justice,
I Wan Adnan CJ (Malaya) and Abu Mansor FCJ held that by virtue of the proviso to s 340(3) of the NLC, a purchaser in good faith and for valuable consideration is excluded from the application of the substantive provision of s 340(3). This category

of registered proprietors obtains immediate indefeasible title to the land. Thus, on the facts of that case, even if the instrument of transfer was forged, the appellant nevertheless obtained an indefeasible title to the land.

The effect of *Adorna Properties* is to confer immediate indefeasibility to the registered proprietor. That decision was followed, *albeit* reluctantly, in a number of subsequent cases. In *Ismail bin Mohmad & Anor v. Ismail bin Husin & Ors* [2005] 7 MLJ 103; [2005] 6 AMR 123, where I sat as a High Court Judge, I held that I was bound by *Adorna Properties* and on that premise, I ruled in favour of the fourth defendant.

...

In that case, even though I found that the signatures of the plaintiffs both on the charge and the annexure to the charge were forged, I held that the charge was valid as I was bound by the decision of the Federal Court in *Adorna Properties*. Therefore, the chargee bank's interest in the said land is indefeasible. I said at p 139:

> ... on that premise I would dismiss the first ground relied upon by learned counsel for the plaintiffs. Similarly I find no merit in the second and third grounds advanced herein. I am of the view that the decision of the Federal Court is binding on this court despite whatever criticism that may be levelled against it. To hold otherwise would be to go against the principle of *stare decisis*.

... much criticism have been levelled against the judgment of the Federal Court in *Adorna Properties* by academic writers. PK Nathan in his article *Nightmare for Registered Owners of Landed Property* published in [2002] MLJ xxiii said:

> The decision of the Federal Court in the case of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 has placed registered owners of landed properties on thin ice and in jeopardy. As a result of the decision, land owners may, one morning, find themselves no longer owning their landed properties without any fault, doing or knowledge in their part.'

... Associate Professor Teo Keang Sood of the Faculty of Law, National University of Singapore in an article *Demise of Deferred Indefeasibility under the Malaysia Torrens System*? (Singapore Journal of Legal Studies, 2002 at pp 403–408) stated:

> Having misconstrued the legislative intent as embodied in s 340, the case of *Adorna Properties Sdn Bhd* is clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament, to change the law, and until that is done, it is for the courts to interpret the law as it stands.

... The learned writer again in a paper presented at the Malaysian Law Conference on 29 October 2007 entitled *Basics of Indefeasibility under the National Land Code* said:

> 'With its decision in *Adorna Properties Sdn Bhd v .Boonsom Boonyanit @ Sun Yok Eng*, the Malaysian Federal Court has not only spawned academic articles on the subject of indefeasibility of title and interests under the National Land Code 1965 (hereinafter referred to as 'the NLC') but has, unfortunately, also left an unwanted trail of uncertainty and insecurity of title for landowners which the Torrens system of land registration embodied in the NLC seeks to avoid, not to mention the slew of conflicting decisions pronounced in its aftermath.

**[32]** His Lordship examined the underlying reason for the decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133:

> The reasons underlying this decision appeared in the judgement of the court rendered by Eusoff Chin CJ. He said that the court is not to look at what is the Torrens system as practised in other jurisdictions but to interpret s 340 as it stands, '... and to find the real intention of Parliament when enacting it ... and the intention of Parliament must be deduced from the language used'.
>
> We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s 340(1), (2) and (3) of the NLC. The court then went on to say that s 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s 340(2) and (3). Thus far, we think the court was right. The difficulties arose in the interpretation of sub-s (2) and sub-s (3). This is what it said at p 245:
>
> Subsection (2) states that the title of any such person, ie any registered proprietor or coproprietor for the time being is defeasible if one of the three circumstances in sub-s (2)(a), (b) or (c) occurs. We are concerned here with sub-s (2)(b) where the registration had been obtained by forgery.

> Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, subs (3)(b) says, any interest under any lease, charge or easement subsequently 'granted thereout', ie, out of the forged document may be set aside.
>
> The proviso to sub-s (3) of s 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are those proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

...

The Court of Appeal took the view that 's 340 of the Code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a *bona fide* purchaser who takes his title from such a registered proprietor'. By this bifurcation, the Court of Appeal concluded that Parliament had intended to confer deferred and not immediate indefeasibility. The Court of Appeal stated with approval the view of Dr Visu Sinnadurai in his book entitled *Sale and Purchase of Real Property in Malaysia* which reads:

> In Malaysia, it is submitted that under s. 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s. 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser.

**[33]** His Lordship then propounded that the proviso only applies to s. 340(3).

What the Federal Court differed from the Court of Appeal was on the effect to be given to sub-s (3).

Having said that the appellant in *Adorna Properties* had acquired its title to the land through or under a forged instrument and it therefore came under the category of title in sub-s (2)(b), the court then went on to hold that such a title is insulated from impeachment by the proviso to sub-s (3).

The question is, does the proviso following immediately after sub-s (3), apply to the other provisions of s 340, in particular to sub-s 2(b). This can only be deduced from the proviso itself. NS Bindra's *Interpretation of Statutes* (9th Ed) at p 110 states that: 'A proviso is something engrafted on a preceeding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision.' A proviso to a subsection would not apply to another subsection (*M/S Gajo Ram v. State of Bihar* AIR 1956 Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v. Assistant Commissioner of Sales Tax* AIR 1955 SC 765).

As we see it, sub-s (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s 340.

Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted

thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso to the sub-s (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

**[34]** And in the next paragraph of his judgment, His Lordship pronounced what had long been awaited, that *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 was wrongly decided:

For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s 340 of the NLC.

**[35]** The Chief Justice, Zaki Azmi, who delivered a supporting judgment, was in total agreement with the Chief Judge of Malaya's view "that the error committed by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133; [2001] 1 MLJ 241 was to read the proviso to sub-s (3) as being a proviso to sub-s (2) as well". The Chief Justice thus approached s. 340.

I would like to look at s 340 of the NLC in a more simplified manner.

Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.

As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

> Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated (see s 340(2)(a) of the NLC). Otherwise, B stands in the same position as A.
>
> The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.
>
> The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-s (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

**[36]** Clearly therefore, with the decision in *Tan Ying Hong*, our Torrens system subscribes once again to the theory of deferred indefeasibility, after a stormy fling with *Frazer v. Walker*.

**[37]** Tan Sook Yee's *Principles of Singapore Law* 3rd edn. at p. 285 thus illustrated the difference between immediate and deferred indefeasibility:

> In the early days of Torrens jurisprudence, there was some uncertainly as to whether a registered proprietor obtained an immediate indefeasible title or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next purchaser. An illustration of the difference between both theories

is as follows: X is the original owner. Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, under the theory of deferred indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as against X. Indefeasibility of title is thus conferred to the next purchaser.

**[38]** In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and/or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. But for the fifth and sixth respondents to have been *bona fide* subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.

**[39]** Accordingly, in relation to leave question 1, which should read as "What was the effect of the judgment in default, which set aside the (order of distribution of) the estate of the deceased,

to the transfers (by the first to fourth respondents) to the fifth and sixth respondents?", we would answer that the defeasible title of the first to fourth respondents was set aside by the default judgment, and that on the instant facts, the defeasible title of the fifth and sixth respondents was swept aside along with that of the first to fourth respondents. In relation to leave question 3, which should read as "Whether the transfers by (the first to fourth respondents) to the fifth and sixth respondents were protected by s. 340 of the National Land Code?", we would answer that the fifth and sixth respondents were immediate purchasers and so were not protected by the proviso to s. 340(3). We need not answer leave question 2, as our aforesaid answers are already more than sufficient to dispose of this appeal.

**[40]** For these reasons, we unanimously allow this appeal with costs. We order that the undivided shares of the fifth and sixth respondents in the said Lots be cancelled from the register, and that the undivided share of the deceased in the said Lots be restored to the estate of the deceased on the register. We would leave it to the beneficiaries of the estate of the deceased to apply for an order of distribution.

**[41]** Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.